

THE TIES THAT BIND:
THE LIMITS OF AUTONOMY AND UNIFORMITY
IN INTERNATIONAL COMMERCIAL ARBITRATION

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1. INTRODUCTION

Responding to the perceived requirements of international commerce, most industrialized nations have enacted legislation that encourages recourse to international commercial arbitration. Legislative support for arbitration, however, has not been unconditional. International commercial arbitration is also a creature of contract and therefore implicates the public policy of the country where it takes place.

The call for autonomy and uniformity in international commercial arbitration reflects a desire to liberate this process from the shackles of local curial norms. Modern national arbitration laws differ in the extent to which they separate international arbitration from domestic public policy; but all laws protect at a minimum those interests deemed vital to basic notions of morality and justice. These are the ties that bind.

This Comment addresses the development of international commercial arbitration in four parts. Section II analyzes the commercial needs which drive international arbitration. Section III describes the importance of autonomy and uniformity in the arbitral process. Section IV discusses the laws of the United States, England and France. Finally, Section V examines the impact which these diverse laws have on arbitral discovery procedures.

2. THE NEED FOR INTERNATIONAL COMMERCIAL ARBITRATION

Economic interdependence is one aspect of the so-called New World Order.¹ The globalization of most national economies² has resulted in a dramatic increase in transna-

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¹ See generally BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER (2d ed. 1990).

² See THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION 42

tional commerce.³ Unfortunately, the increasing volume of international commercial activity has generated a concomitant increase in international commercial disputes. An effective framework for the resolution of these disputes has become indispensable to the continued viability and expansion of transnational commerce.⁴ The parties in international commerce demand a process capable of rendering efficient, fair and final decisions.⁵ They also seek a process based on uniform principles that can easily be incorporated into their business activities without misunderstandings or surprises.⁶

Because there is no international authority with jurisdiction over private commercial disputes, parties must rely upon state-based adjudicative mechanisms,⁷ generally either litigation or arbitration.

The first option, litigation in national courts, is frequently an unreliable and undesirable means of resolving international commercial disputes.⁸ In short, this process can be costly,

(1989). See generally JOHN H. BARTON & BART S. FISHER, *INTERNATIONAL TRADE AND INVESTMENT* (1986); JOHN H. JACKSON & WILLIAM J. DAVEY, *INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1986).

³ Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 192-3 (1988).

⁴ CARBONNEAU, *supra* note 2, at 43.

⁵ See Edward R. Leahy & Kenneth J. Pierce, *Sanctions to Control Party Misbehavior in International Arbitration*, 26 VA. J. INT'L L. 291, 293 (1986).

⁶ Michael Gaudet, *Overcoming Regional Differences*, J. INT'L ARB., Dec. 1988, at 67, 78 (vol. 5).

⁷ While the world awaits the advent of an international commercial court, bilateral and multilateral agreements have already created fora with limited jurisdiction over commercial disputes. For example, the Court of Justice for the European Communities may be seized by private (non-institutional) parties under certain limited circumstances, and is competent to rule on the interpretation and application of the treaties which drive the communities. See generally JEAN BOULOUIS, *DROIT INSTITUTIONNEL DES COMMUNAUTÉS EUROPÉENNES* (1984). The Iran-United States Claims Tribunal, created under the Algiers Accords, is an arbitral institution with jurisdiction to resolve the commercial disputes that arose as a result of the political upheaval in Iran in 1979. See Monica P. McCabe, *Arbitral Discovery and the Iran-United States Claims Tribunal Experience*, 20 INT'L LAW. 499, 511 n.101 (1986).

⁸ See, e.g., Leahy & Pierce, *supra* note 5, at 292; Lawrence Perlman & Steven C. Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215 (1983); Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187 (1989); Peter D. Ehrenhaft, *Effective International Commercial Arbitration*,

slow,⁹ biased¹⁰ and uncertain.¹¹

In an effort to avoid these problems, international business-people and their counsel have turned toward commercial arbitration to resolve their disputes.¹² Most industrial nations, recognizing that effective arbitration is essential to the success of international commerce,¹³ have enacted legisla-

9 LAW & POL'Y INT'L BUS. 1191, 1191-94 (1977). For a general discussion of the issues surrounding international litigation, see GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (1989).

⁹ The cost and delay associated with wholly domestic litigation (pre-hearing procedure, multiple appeals, crowded dockets, etc.) remain problems when one or more of the parties are foreign. In fact, these problems are often magnified. The cost of litigating a claim abroad is higher simply because it may require frequent travel and retaining translators and foreign counsel.

Furthermore, jurisdictional uncertainty decreases the efficiency of litigation by encouraging lengthy and expensive battles over personal and subject matter jurisdiction. See Ehrenhaft, *supra* note 8, at 1192. Worse still, this same uncertainty may lead to forum-shopping and multiple proceedings. See Nelson, *supra* note 8, at 188-89.

¹⁰ Whether or not a legitimate concern, a party forced to litigate before the courts of the party's opponent may well perceive bias. See Leahy & Pierce, *supra* note 5, at 292. Even if judicial parity exists, a foreign litigant may nonetheless be disadvantaged by a lack of familiarity with the substantive and procedural rules of the forum, its customs, and its language. See Ehrenhaft, *supra* note 8, at 1193. While a forum selection clause may help reduce the risk of bias, such a clause cannot guarantee neutrality. For any number of reasons, a judicial officer of the selected forum may favor one party over another. See Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 10 n.3 (1986).

¹¹ Even after a decision has been rendered on the merits and all appeals have been exhausted, the prevailing litigant may be hard pressed to enforce the court's judgement. No broad-based international norm assures that judgments rendered in one country will receive "full faith and credit" in another. See Nelson, *supra* note 8, at 190-91. The public policy exception, discussed at length in Section 3.2, *infra*, is frequently invoked to justify the refusal of one court to recognize and enforce the decisions of another. See Javier García de Enterría, *The Role of Public Policy in International Commercial Arbitration*, 21 LAW & POL'Y INT'L BUS. 389, 393 (1990).

¹² See Perlman & Nelson, *supra* note 8, at 225; Thomas E. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L. J. 33, 34 (1984) [hereinafter Carbonneau, *Arbitral Adjudication*] ("With the growth of international trade, arbitration has emerged as the preferred remedy for disputes in private international commerce.") (footnote omitted).

¹³ For example, the Supreme Court of the United States has emphasized:

tion favorable to this process.¹⁴ This development has been characterized by a greater degree of autonomy and uniformity.

3. THE CALL FOR AUTONOMY AND UNIFORMITY

3.1. Party Autonomy: Supplementing Choice and Flexibility

Perhaps the most significant advantage of international commercial arbitration over litigation is flexibility. While litigation tends to impose a rather rigid framework upon the parties and their dispute, arbitration can be "custom-tailored to suit the parties' needs and desires."¹⁵ The result is an adjudicatory process superior to litigation in many instances. For example, while international commercial arbitration may be more costly and time-consuming than its domestic analog,¹⁶ it is quite efficient and inexpensive when compared with international litigation.¹⁷ Furthermore, the parties' ability to select a neutral decision-maker and situs theoretically leads to a less biased decision.

Arbitral flexibility also permits the parties to create a specialized process. They are able to select decision-makers with the requisite expertise¹⁸ and procedural rules specifically adapted to the circumstances surrounding the dispute.¹⁹ Furthermore, rather than relying on the rigid choice-of-law

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction

Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974). See also The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629-31 (1985).

¹⁴ See *infra* Section 3.

¹⁵ Ehrenhaft, *supra* note 8, at 1194.

¹⁶ Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 61 (1982).

¹⁷ See Smit, *supra* note 10, at 11 (1986); Russell B. Stevenson, *An Introduction to ICC Arbitration*, 14 J. INT'L L. & ECON. 381, 382-84 (1980).

¹⁸ See Stevenson, *supra* note 17, at 381; Ehrenhaft, *supra* note 8, at 1194; ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 1 (1981).

¹⁹ See J. Van Compernelle, *L'Arbitrage Dans Les Relations Commerciales Internationales: Questions de Procédure*, 66 R.D. INT'L & D. COMP. 101, 110 (1989).

provisions of the forum, parties to an arbitration may select the law which will govern the substance of their dispute.²⁰ This chosen law need not come from traditional sources. For example, the parties may empower the arbitral tribunal to rule *ex aequo et bono*,²¹ as an *amiable compositeur*²² or with regard to the developing *lex mercatoria*.²³

Finally, whereas judicial proceedings are frequently public events, the parties to an arbitration can choose to keep the proceedings confidential.²⁴ Such an arrangement benefits parties who hope to preserve their business relationships and keep their disputes "in the family."²⁵

While the call for greater flexibility has led to a greater degree of party autonomy in international commercial arbitration, the parties have not been given unfettered control.

3.2. Public Policy: The Bonds of Domestic Law

3.2.1. Public Policy and the Limits of Party Autonomy

A contractual relationship involves a dynamic interplay between the interests of two distinct legal orders, the internal order created by the contract itself and the external order from which the contract derives its legal effect and legitimacy. Since the parties to a contract may wish to further interests which rival those of the state, it is not unusual for the two legal regimes to come into conflict. When this occurs, one legal order must yield.

²⁰ A simple choice-of-law provision, however, does not guarantee that the chosen law will be applied. For instance, the conflict-of-law rules of the selected law may direct that a different body of law govern the dispute. See Ehrenhaft, *supra* note 8, at 1209.

²¹ Party control over the substance of arbitration derives from the fact that national courts will not generally review the merits of an arbitral award. See VAN DEN BERG, *supra* note 18, at 33.

²² Literally a friendly composer. Such a provision allows the members of the tribunal to follow their instincts and create law consistent with their own notions of fairness and justice. W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 8.05 (2d ed. 1990).

²³ See, eg., Stevenson, *supra* note 17, at 382; VAN DEN BERG, *supra* note 18, at 33.

²⁴ Stevenson, *supra* note 17, at 381.

²⁵ de Vries, *supra* note 16, at 43.

Certain legal rules are so basic to a legal system that the parties may not derogate from them in a contract. These "minimum standards of justice and morality"²⁶ may be grouped under the common law heading "public policy" or its civil law equivalent "*ordre public*."²⁷

Despite the importance of the concept of public policy in contract theory, it cannot be defined with great precision. One scholar has described public policy as "one of the most elusive and divergent notions in the world of juridical science."²⁸ In general, public policy is a national phenomenon having a substantive as well as a procedural dimension.²⁹ The specific content of the concept varies according to the peculiar moral, legal and social traditions of a particular place at a particular time.³⁰

Scholars in the field of private international law often distinguish between domestic and international public

²⁶ García de Enterría, *supra* note 11, at 392.

²⁷ See VAN DEN BERG, *supra* note 18, at 376. Although the terms are frequently used interchangeably, the common law term "public policy" is generally applied more narrowly than the civil law term "*ordre publique*." *Id.* at 359. Public policy is most often discussed in the context of private international law as a defense by which states reject foreign acts or norms deemed inconsistent with fundamental legal principles. See, e.g., García de Enterría, *supra* note 11. While the notion of *ordre public* includes this aspect, it is also used to describe domestic norms from which parties may not derogate. *Id.* at 395. In this paper, the term public policy will be used with the understanding that it has the same meaning as the term "*ordre public*."

²⁸ García de Enterría, *supra* note 11, at 401 (citing Ferrante, *Enforcement of Foreign Arbitral Awards in Italy and Public Policy*, in HOMMAGE À FREDERICK EISEMANN 86 (1978)).

²⁹ Thus, in a given country it may include principles as diverse as minimum wage and fair notice requirements. Public policy is related to, but should not be confused with, due process. Public policy has a substantive content which, notwithstanding modern constitutional law, is not normally associated with due process. Furthermore, specific due process requirements vary according to the type of case (civil or criminal) or the particular forum (judicial, administrative, or arbitral). See Steven J. Stein & Daniel R. Wotman, *The Arbitration Hearing*, in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 86, 93 (J. Stewart McClendon & Rosabel E. Everhard Goodman eds., 1986) (Due process requirements in arbitration are less stringent than those imposed in litigation.).

³⁰ García de Enterría, *supra* note 11, at 401. As a country's notions of justice and morality evolve, so too does its concept of public policy. *Id.* at 402.

policy.³¹ While domestic public policy includes all of the mandatory norms of a given jurisdiction, international public policy includes only the most basic notions of morality and justice, those that are regarded as essential to the preservation of social and legal order.³² The need for such a distinction arises from the unique problems present in international disputes.

3.2.2. Public Policy and Commercial Arbitration

Parties who wish to have their disputes settled by a private mode of adjudication can write a contractual agreement for commercial arbitration. Most states accommodate arbitration by granting parties the freedom to fashion a remedial process tailored to their needs. However, the country supporting the arbitration may wish to preserve the integrity of its legal order or protect the rights of non-parties.³³ Consequently, party autonomy is always subject to considerations of public policy expressed by the heteronomous provisions of some arbitration law or *lex arbitri*.

In principle the *lex arbitri* governs all phases of arbitration including the validity and effect of the submission as well as the selection of the tribunal prior to the arbitration; the procedural and substantive rules during the arbitration; and the form, interpretation, review and enforcement of the award after the arbitration.³⁴ Therefore, at every stage, public policy considerations impose mandatory requirements upon the

³¹ *Id.* at 396-98.

³² See García de Enterría, *supra* note 11 at 396. International public policy, despite its appellation, remains a creation of individual national legal systems and should not be confused with transnational public policy created at the global level. *Id.* at 397.

Certain fundamental principles characterize most modern legal systems. For example, the American notions of "notice" and "opportunity to be heard" correspond closely with the French "contradictoire" and "droit de defense." See REPERTOIRE DE PROCEDURE CIVILE [C. PR. CIV.] arts. 14-20 (Dalloz 1987) (Fr.).

³³ William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21, 22 (1983).

³⁴ de Vries, *supra* note 16 at 50. The concept of public policy as it relates to commercial arbitration is almost exclusively discussed in relationship to the post-arbitral enforcement stage. See, e.g., García de Enterría, *supra* note 11, at 390.

arbitral tribunal and define the available judicial remedies for assisting or controlling the arbitral process.³⁵

3.3. *The Need for Uniform Lex Arbitri*

Because each phase of the arbitral process in international commercial arbitration may occur in a different state, the choice of applicable *lex arbitri* may be quite complex. For example, in a dispute between an American corporation and an English corporation, a federal district court in New York might refer the parties to arbitration, which, because of prior agreement, takes place in Paris and results in an award that is enforced in Switzerland where the losing party has substantial assets. In this case the arbitral process would be affected by the mandatory provisions of three distinct national arbitration laws, each of which might reflect a different public policy formulation. Under such a scenario, the arbitral process could become unpredictable. First, the parties would be unsure of the legal effect of their submission clause. An enforceable agreement in England might not be enforceable in the United States. In addition, procedural provisions acceptable in the United States might run against a mandatory provision of French law, thereby frustrating the intent of the parties.³⁶ Finally, and perhaps most significantly, an award binding under French law may be unenforceable in Switzerland.³⁷

3.4. *The New York Convention: One Leap Toward Uniformity*

The New York Convention,³⁸ a transnational agreement attempting to unify private international law,³⁹ "reconcile[s]

³⁵ de Vries, *supra* note 16, at 71.

³⁶ ISAAK I. DORE, ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS 89 (1986).

³⁷ CRAIG, PARK & PAULSSON, *supra* note 22, at § 1.06.

³⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature*, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. For a comprehensive treatment of the New York Convention, see VAN DEN BERG, *supra* note 18. See also García de Enterría, *supra* note 11.

³⁹ CARBONNEAU, *supra* note 2, at 65. See also García de Enterría, *supra* note 11, at 391 (The Convention is "one of the more spectacular success stories in the slowly moving area of creating judicial order and uniformity in the field of private international law.") (citing Hans Harnik, *Recognition and Enforcement of Foreign Arbitral Awards*, 31 AM. J. COMP. L. 703

among the contracting states [potentially conflicting provisions] for the acceptance of arbitration clauses and [foreign arbitral] awards.⁴⁰ The Convention gives preeminence to the notion of party autonomy⁴¹ and minimizes the imposition of parochial views by expressly providing the conditions under which national courts may intervene. The Convention contains a "most favorable right" provision and thus supersedes any municipal law that is more rigid.⁴²

Article II of the Convention provides that the court of a contracting state must enforce an agreement to arbitrate unless it determines (1) that the subject matter of the dispute is incapable of settlement by arbitration,⁴³ or (2) that the agreement itself is null and void, inoperative or incapable of being performed.⁴⁴ The effect of this article is to create a presumption in favor of arbitration that can only be overcome by a showing of contractual defect.⁴⁵

The New York Convention also proposes a limited role for national courts with regard to the enforcement of arbitral awards. Article V establishes the seven grounds upon which the court of a contracting state may review a foreign arbitral award for the purposes of recognition and enforcement. The first five of these grounds are quite specific and relate to

(1983)).

⁴⁰ García De Enterría, *supra* note 11, at 391. According to the United States Supreme Court, "The goal of the Convention, and the principle purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Id.* at 391 n.4 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15, *reh'g denied*, 419 U.S. 885 (1974)). See also CARBONNEAU, *supra* note 2, at 65.

⁴¹ See Van Compernelle, *supra* note 19, at 102.

⁴² New York Convention, *supra* note 38, Art. VII (1), 21 U.S.T. at 2520-21. See VAN DEN BERG, *supra* note 18, at 82-84 (noting that an exclusivity provision would have improved uniformity).

⁴³ New York Convention, *supra* note 38, Art. II (1), 21 U.S.T. at 2519. See VAN DEN BERG, *supra* note 18, at 152-54. Non-arbitrability is also an exception to the enforcement of an arbitral award under Art. V(2)(a). See discussion *infra* notes 45-46 and accompanying text.

⁴⁴ New York Convention, *supra* note 38, Art. II (1), 21 U.S.T. at 2519. See VAN DEN BERG, *supra* note 18, at 154-56; CARBONNEAU, *supra* note 2, at 65-66.

⁴⁵ CARBONNEAU, *supra* note 2, at 66.

fundamental contractual and due process requirements.⁴⁶ These defenses can only be applied at the request of the party against whom the award is invoked.⁴⁷

Article V also lays down two grounds for denying recognition and enforcement that a court may raise *sua sponte*. Thus, a court may refuse to recognize or enforce a foreign arbitral award if it deems that under its laws: (a) the subject matter of the dispute is not capable of settlement by arbitration;⁴⁸ or (b) recognition or enforcement of the award would be contrary to public policy.⁴⁹

The inclusion of a separate public policy exception is disconcerting because the other six exceptions are based on public policy notions.⁵⁰ If the public policy provision merely reiterates these defenses then it is superfluous. Some scholars have therefore claimed that the purpose of this defense is to

⁴⁶ *Id.* at 66. Art. V(1)(a-e) provides that recognition and enforcement of an award may be refused at the request of the losing party only if that party can prove any of the following: (a) that one or both parties lacked the contractual capacity to enter into a binding agreement to arbitrate; (b) that the losing party was denied proper notice or the opportunity to be heard; (c) that the arbitrator[s] exceeded the authority granted to them by the agreement; (d) that the composition of the arbitral tribunal or the arbitral procedure was inconsistent with the agreement (or in its silence the law of the forum); and finally, (e) that the award is not yet binding or has been set aside. See VAN DEN BERG, *supra* note 18, at 275-358.

⁴⁷ New York Convention, *supra* note 38, Art. V (2), 21 U.S.T. at 2520.

⁴⁸ New York Convention, *supra* note 38, Art. V (2)(a), 21 U.S.T. at 2520. See VAN DEN BERG, *supra* note 18, at 368-75. This provision is essentially identical to one found in Article II(1). See *infra* note 40. Both provisions have been interpreted as referring to arbitrability of the dispute under the law of the state where enforcement is sought, not where the award was made. See VAN DEN BERG, *supra* note 18, at 369.

⁴⁹ New York Convention, *supra* note 38, Art. V (2)(b), 21 U.S.T. at 2520. The inclusion of both the non-arbitrability and public policy exceptions is somewhat redundant since non-arbitrability has traditionally been considered an element of public policy. See VAN DEN BERG, *supra* note 18, at 359. As one scholar stated, the non-arbitrability of a particular subject matter "reflects a special national interest in judicial . . . resolution of disputes." *Id.* at 369. See also CARBONNEAU, *supra* note 2, at 66-67; García de Enterría, *supra* note 11, at 411. The reason that both provisions figure in the text is historical. The non-arbitrability exception appeared as a distinct ground in the Geneva Convention of 1927, the ICC Draft Convention of 1953 and the ECOSOC Draft Convention of 1955. See VAN DEN BERG, *supra* note 18, at 368.

⁵⁰ See García de Enterría, *supra* note 11, at 416.

serve as a "residual escape clause"⁵¹ in cases where the specific defenses do not apply.⁵² Such a catch-all provision could have resulted in unrestrained judicial interference, undermining the basic purpose of the Convention to reduce the impact of domestic legislation.⁵³

However, the public policy provision has not been construed so broadly. In fact, the decisional law of signatory states demonstrates that national courts almost uniformly interpret the public policy exception and the other defenses listed under Articles II and V narrowly and by reference to the underlying intent of the Convention.⁵⁴

Many courts have interpreted Articles II(1), V(2)(a) and V(2)(b) as authorizing judicial interference only when considerations of international public policy are at stake.⁵⁵ International public policy has a more limited content and scope of application than domestic public policy.⁵⁶

As a result of this analysis, the scope of judicial supervision is narrowed and foreign arbitral awards are more likely to be recognized and enforced than foreign court judgments.⁵⁷ Ultimately, the New York Convention represents a triumph of

⁵¹ *Id.* at 416.

⁵² *Id.* at 416-17, 417 n.130.

⁵³ One author describes the public policy exception as the "enemy" of international commercial arbitration. García de Enterría, *supra* note 11, at 405 (citing Michael Quilling, *The Recognition and Enforcement of Foreign Country Judgments and Arbitral Awards: A North-South Perspective*, 11 GA. J. INT'L & COMP. L. 635, 646 (1981)).

⁵⁴ See CARBONNEAU, *supra* note 2, at 67. For example, the public policy defense is rarely invoked except in cases of alleged lack of due process. See VAN DEN BERG, *supra* note 18, at 376; García de Enterría, *supra* note 11, at 413.

⁵⁵ See VAN DEN BERG, *supra* note 18, at 391. For example, U.S. courts have concluded that "the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice [as opposed to mere public policy concerns]." *Parsons v. Whittemore*, 508 F.2d 969, 974 (2d Cir. 1974). See also CRAIG, PARK & PAULSSON, *supra* note 22, at § 5.07; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

⁵⁶ See *supra* Section 3.2.1. See also VAN DEN BERG, *supra* note 18 at 360; García de Enterría, *supra* note 11, at 396.

⁵⁷ de Vries, *supra* note 16, at 56-57. As of 1987, 73 countries were signatories to the Convention. *Signatories to the 1958 New York Convention*, J. INT'L ARB., Mar. 1988, at 117 (vol. 5).

uniformity and party autonomy over diversity and parochialism.

4. THE LIMITS OF AUTONOMY AND UNIFORMITY

4.1. *Diversity and the Lex Arbitri*

4.1.1. *The Limited Scope of the New York Convention*

While the New York Convention reflects the great strides that have been made toward unifying and liberalizing the rules of international commercial arbitration, its field of application, and thus its ultimate effect, are limited. The Convention does not regulate all aspects of international commercial arbitration.⁵⁸ The Convention reaches the validity of arbitration agreements and the enforcement of foreign arbitral awards but does not govern the actual conduct of the arbitrations that fall under its purview. It leaves such important issues as the constitution of the arbitral tribunal, the selection of the procedural and substantive rules, and the confirmation or annulment of awards to the *lex arbitri* of a particular country.⁵⁹ No widely adopted convention has yet established a unified transnational rule of law with regard to the entire arbitral process.⁶⁰ However, there has been a definite trend toward greater autonomy.⁶¹

⁵⁸ See VAN DEN BERG, *supra* note 18, at 9-10.

⁵⁹ *Id.* at 99.

⁶⁰ However, in the field of investment disputes, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention), March 18, 1965, 575 U.N.T.S. 160, provides a comprehensive scheme for international commercial arbitration. Arbitrations falling under the Washington Convention are administered by the International Center for Settlement of Investment Disputes ("ICSID"), according to the provisions of the Convention and the arbitration rules issued thereunder and to the exclusion of any national arbitration law. See VAN DEN BERG, *supra* note 18, at 98. For a discussion of other bilateral and multilateral arbitration agreements, see VAN DEN BERG, *supra* note 18, at 90-120.

⁶¹ CRAIG, PARK & PAULSSON, *supra* note 22, at § 1.06.

4.1.2. *The Liberalization of Arbitration Law*

Historically, the laws of many countries mandated close judicial supervision of the arbitral process.⁶² Today however, most *lex arbitri* authorize only minimal court intervention. In fact, some legal scholars have suggested that parties should be completely free to detach the arbitral proceedings from the law of the *situs*.⁶³ A less radical formula that is consistent with

⁶² Courts have traditionally viewed arbitration with hostility, as a potentially dangerous derogation of their monopoly of adjudicative competence. See generally Carbonneau, *Arbitral Adjudication*, *supra* note 12, at 39-57. Where the parties' initial choice of arbitration could not be defeated, courts mandated broad judicial oversight to ensure that the arbitrators achieved legally correct results. *Id.* at 41.

This model gradually became obsolete for a number of reasons. First, national courts overcame their traditional suspicion of alternative means of dispute resolution. Indeed, as court dockets have swollen, the courts of many countries have embraced alternative dispute resolution in general and arbitration in particular as a practical necessity. See generally CARBONNEAU, *supra* note 2. Additionally, modern commercial realities have made the use of arbitration a necessity. See RENEE DAVID, *L'ARBITRAGE DANS LE COMMERCE INTERNATIONALE* 41 (1982).

Commentators have also criticized the territorial basis of the judicial oversight model, pointing out that the *situs* of most arbitrations is chosen for reasons of neutrality or geographic appropriateness and not because of the relationship between the parties, their dispute, and the law of the forum. In the absence of such a nexus, it is more difficult to justify local interference. Jan Paulsson, *Delocalization of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53, 54-55 (1983). Finally, as major industrial centers vie for a greater share of the global arbitration business, it has become evident that excessive judicial supervision may drive potential customers away. See Carbonneau, *Arbitral Adjudication*, *supra* note 12, at 62.

⁶³ See, e.g., Paulsson, *supra* note 62, at 61. This view has recently been at the center of a heated debate over what has variously been called "de-nationalized" or "de-localized" arbitration. See generally Park, *supra* note 33; Paulsson, *supra* note 59; VAN DEN BERG, *supra* note 18, at 28-43.

Proponents of de-nationalized arbitration contend that the parties may authorize the arbitral tribunal to exclude the applicability of any national arbitration law. They aver further that the "a-national" or "floating" award produced by such an arbitration may be enforced abroad despite annulment by the forum state. See, e.g., Paulsson, *supra* note 62, at 53. The French case, *Libyan Maritime Co. v. Gotaverken*, Cour d'Appel de Paris (1re Ch.) (Feb. 21, 1980), is frequently cited as supporting this view. In that case, a French court of appeals dismissed a challenge to an arbitral award rendered in Paris under I.C.C. rules on the ground that the award was not governed by French arbitration law.

The opponents of de-nationalized arbitration have vigorously rejected this interpretation of *Gotaverken* and the concept of de-nationalized arbitration as a whole. No court, the critics point out, has given effect to an

the concept of international public policy would not totally detach international arbitrations from their country of origin but would subject them to fewer constraints than a domestic arbitration.⁶⁴ This approach would limit judicial intervention to ensuring compliance with "the minimum norms of transnational currency"⁶⁵ such as those embodied in Article V of the New York Convention.⁶⁶ Thus, according to one scholar, the mandatory public policy requirements applicable to international arbitrations would be limited to the right of each party to present its own case and the right to discuss the position of the opposing party.⁶⁷

arbitral award that was annulled by the forum state. In fact, in *Gotaverken*, the French court refused to annul the award. See Park, *supra* note 33, at 26. Critics also attack the "contractualist" underpinnings of this view, arguing (weakly, I believe) that "[e]very right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law." *Id.* at 23 (citing Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE, 159 (P. Sanders ed., 1967)).

Finally, critics persuasively challenge the desirability of de-nationalized arbitration. National courts, they contend, are necessary as a supporting judicial authority (*autorité d'appui*) without which arbitration would often grind to a halt. Courts are necessary, for instance, to enforce interim arbitral orders. If the law of the situs is inapplicable, then it is difficult to see how the jurisdiction of the local courts can be invoked. See VAN DEN BERG, *supra* note 18, at 30; de Vries, *supra* note 16, at 47; Steven Stein & Daniel Wotman, *International Commercial Arbitration in the 1980's: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685, 1705 (1983). Finally, critics challenge the legal basis of this approach. An arbitral award that cannot be challenged under the law of forum where it was rendered might not fall under the New York Convention and may be unenforceable abroad. See VAN DEN BERG, *supra* note 18, at 34-40; Park, *supra* note 33, at 30. On the other hand, if an invalid a-national award is generally enforceable, then the losing party will be unjustly forced to attack the award in every state where it might be enforced. See VAN DEN BERG, *supra* note 18, at 34-40; Park, *supra* note 33, at 30.

⁶⁴ Park, *supra* note 33, at 26.

⁶⁵ Paulsson, *supra* note 62, at 57.

⁶⁶ Park, *supra* note 33, at 31.

⁶⁷ INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL ARBITRATION: 60 YEARS OF ICC ARBITRATION AND A LOOK TO THE FUTURE 267 (1984) (statement of Berthold Goldman) (quoted in CRAIG, PARK & PAULSSON, *supra* note 22, at § 16.04.).

4.1.3. *The UNCITRAL Model Law*

In 1985, the United Nations Commission on International Trade Law ("UNCITRAL") drafted a model law to supplement the New York Convention.⁶⁸ The model law is intended to serve as a prototype for domestic arbitration legislation. Its primary purpose is to harmonize the practice and procedure of international commercial arbitration by liberating the process from the peculiar constraints imposed by the domestic law of the situs.⁶⁹ Like the New York Convention, the UNCITRAL model law gives maximum effect to the principle of party autonomy.⁷⁰ Accordingly, it prescribes a limited role for the courts.⁷¹

To date, only Canada, Cyprus and California have adopted the model law.⁷² The modest response to UNCITRAL's endeavor can be attributed in part to its relative novelty.⁷³ More importantly, however, the limited response is a reflection of global dissonance.⁷⁴ Unlike the New York Convention, which codified "an existing and emerging international consensus on arbitration,"⁷⁵ the UNCITRAL model law must overcome a genuine and persistent disparity of views.

⁶⁸ Report of the United Nations Commission on International Trade Law on the work of its 18th session, 40 U.N. GAOR supp. (no. 17), U.N. Doc. A/40/17 Annex 1(1985) [hereinafter UNCITRAL model law] reprinted in DORE, *supra* note 36, at app.4.

⁶⁹ See generally Michael Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration*, 20 INT'L LAW. 327 (1986); Sigvard Jarvin, *Choosing the Place of Arbitration: Where Do We Stand?*, INT'L BUS. LAW., Oct. 1988, at 418; James Rhodes & Lisa Sloan, *The Pitfalls of International Commercial Arbitration*, 17 VAND. J. TRANSNAT'L L. 19, 23 (1984).

⁷⁰ DORE, *supra* note 36, at 89; Hoellering, *supra* note 69, at 328-29.

⁷¹ DORE, *supra* note 36, at 89-90, 98-99.

⁷² Jarvin, *supra* note 69, at 418. Connecticut, Florida and Texas modeled their new laws on the UNCITRAL law. Jack Garvey & Totton Heffelfinger, *Towards Federalizing U.S. International Commercial Arbitration Law*, 25 INT'L LAW. 209, 210 (1991).

⁷³ *Id.* at 418.

⁷⁴ One reason that Switzerland did not adopt the model law when it recently overhauled its federal arbitration law is that the model law did not reflect the Swiss approach. See Marc Blessing, *The New International Arbitration Law in Switzerland: A Significant Step towards Liberalism*, J. INT'L ARB., June 1988, at 15-16 (vol. 5).

⁷⁵ CARBONNEAU, *supra* note 2, at 67.

4.2. *Lex Arbitri: Three Salient Examples*

Despite the trend toward greater arbitral autonomy, most countries do not allow the parties to completely avoid the mandatory strictures of their domestic arbitration law. The ties that bind arbitration to a country's legal order are hard to break. The lack of consensus on this point can be seen by comparing the *lex arbitri* of the United States, England and France. While all three countries have adopted the New York Convention,⁷⁶ and all three have enacted modern arbitration statutes dealing with international cases, France has gone the farthest in freeing international commercial arbitration from the peculiarities of its domestic law.

4.2.1. *The United States Arbitration Act*

The U.S. Arbitration Act ("USAA") governs the international commercial arbitrations taking place in the United States.⁷⁷ The USAA is similar to the UNCITRAL model law in its emphasis on party autonomy.⁷⁸ Thus, within the confines of basic public policy, the parties can choose the procedural rules applicable to the arbitration.⁷⁹ For example, while formal evidentiary rules do not automatically apply to arbitral proceedings under the USAA, the tribunal must hear all relevant evidence.⁸⁰ The procedural safeguards are

⁷⁶ The United States acceded to the Convention in 1970. VAN DEN BERG, *supra* note 18, at annex C (referencing 9 U.S.C. § 201 *et seq.*) The United Kingdom acceded in 1975. *Id.* (referencing the Arbitration Act of 1975, c.8.) France ratified the Convention in 1959. See CARBONNEAU, *supra* note 2, at 68.

⁷⁷ 9 U.S.C. §§ 1-14, 201-208 (1988). Chapter 2 of the USAA (§§ 201-208), which deals specifically with international commercial arbitration, was enacted in 1970 as the enabling legislation for the New York Convention. While Chapter 2 only regulates the enforcement of agreements to arbitrate and foreign arbitral awards, it incorporates by reference all non-conflicting provisions of Chapter 1 (§§ 1-14). See J. Stewart McClendon & Rosabel E. Everhard Goodman, *The U.S. Federal System and International Commercial Arbitration*, in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, *supra* note 29, at 17-19. State laws affecting arbitration apply only to the extent that they do not conflict with the provisions of the USAA. *Id.* at 19. See also *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Univ.*, 489 U.S. 468 (1989).

⁷⁸ See Carbonneau, *Arbitral Adjudication*, *supra* note 12, at 47.

⁷⁹ *Id.*

⁸⁰ 9 U.S.C. § 10(c) (1988); see Carbonneau, *Arbitral Adjudication*, *supra*

intended to preserve the integrity of the arbitral process.⁸¹ Except for these heteronomous norms, international commercial arbitration under the USAA seems to be free from the peculiarities of American law.

4.2.2. *The Arbitration Act of 1979*

English arbitration law historically sanctioned broad judicial oversight of arbitral proceedings.⁸² The relative heteronomy of the English process diminished the attractiveness of England as a situs for international commercial arbitration.⁸³ In an effort to reverse this situation Parliament enacted the Arbitration Act of 1979, which sharply curtails the courts' supervisory role.⁸⁴ In addition, the Act allows the parties to an international arbitration agreement to exclude or oust the jurisdiction of the English courts in many cases.⁸⁵ The new law is consistent with the trend toward greater arbitral autonomy and reflects the position expressed by one English judge that the courts "should impose no rules of practice on the conduct of the arbitrators . . . except such as are absolutely necessary to secure justice."⁸⁶

Notwithstanding this strong statement in favor of autonomy, the English still adhere to the principle that the arbitrat-

note 12, at 47.

⁸¹ *Id.*

⁸² Prior to 1979, commercial arbitration in England was subject to the so-called "case stated" procedure by which a party could have a legal point reviewed by the courts at any point during the proceedings. Park, *supra* note 33, at 33; Carbonneau, *Arbitral Adjudication*, *supra* note 12, at 44. This procedure allowed parties on the verge of losing to pull a "December surprise" and delay the unfavorable award by requesting judicial review of some legal issue. See CRAIG, PARK & PAULSSON, *supra* note 22, at § 29.01. For a general discussion of England's arbitration laws, see Michael J. Mustill & Stewart C. Boyd, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* (1982).

⁸³ J. Kodwo Bentil, *Making England a More Attractive Venue for International Commercial Arbitration by Less Judicial Oversight*, J. INT'L ARB., Mar. 1988, at 49, 50 (vol. 5).

⁸⁴ See Park, *supra* note 33, at 35-52; Bentil, *supra* note 83. In particular, the Act abolished the "case stated" procedure. Arbitration Act of 1979, § 1(1).

⁸⁵ Arbitration Act of 1979, § (3). See Park, *supra* note 33, at 41-44; Bentil, *supra* note 83, at 53-55.

⁸⁶ French Gov't v. Tsurushima Maru, 7 Ll. L. Rep. 244, 248 (1921) (Per Bray, J.) (quoted in Mustill & Boyd, *supra* note 82, at 252).

ors' powers exist by virtue of an agreement and thus are subject to the same restrictions that apply to every other private contract.⁸⁷ In general, English public policy will nullify any arbitral procedure which unreasonably restricts the right of a party to invoke the power of the High Court or is inconsistent with basic procedural requirements.⁸⁸

Thus, the overall effect of the Arbitration Act of 1979 is not as great as it may initially seem. To begin with, the so-called exclusion agreement is void as to admiralty, insurance and commodities cases.⁸⁹ Furthermore, a party cannot abrogate the "benefits" of English arbitral law, including the assistance of the High Court in enforcing interlocutory orders.⁹⁰ Thus, the English *lex loci arbitri* continues to leave the High Court with powers sufficient to justify vast judicial interference with the arbitral process.⁹¹

4.2.3. *The French Decree of May 12, 1981*

The French Decree of May 12, 1981⁹² codified and clarified the traditionally liberal French law of international arbitration.⁹³ Like its American and English counterparts, the new French law emphasizes the doctrine of party auton-

⁸⁷ Mustill & Boyd, *supra* note 82, at 21.

⁸⁸ *Id.* at 246.

⁸⁹ Arbitration Act of 1979, §§ 4(1)(a-c). See Park, *supra* note 33, at 43; see also Bentil, *supra* note 83, at 55.

⁹⁰ Arbitration Act of 1979, § 5. Park, *supra* note 33, at 44; see also Carbonneau, *Arbitral Adjudication*, *supra* note 12, at 62-63.

⁹¹ Park, *supra* note 33, at 51-52.

⁹² Decree of May 12, 1981, No. 81-500, 1981 J.O. 1398. See W. Laurence Craig, William W. Park & Jan Paulsson, *French Codification of a Legal Framework: The French Decree of May 12, 1981*, 13 L. & POLY INT'L BUS. 727 (1981) [hereinafter Craig, Park & Paulsson, *French Codification*]; Georges R. Delaume, *International Arbitration under French Law*, ARB. J., Mar. 1982, at 38 (vol. 37); Carbonneau, *Arbitral Adjudication*, *supra* note 12, at 77-82. The Decree completed a long awaited overhaul of the French Code of Civil Procedure (*Nouvelle Code de Procedure Civile* ("NCPC")), which began with the French Decree of May 14, 1980, No. 80-354, originally published in J.O., May 18, 1980, at 1238. See Delaume, *supra*, at 39. This effort at reform resulted in fifty-five new articles in the NCPC. C. PR. CIV., arts. 1442-1507 (Dalloz 1987).

⁹³ Craig, Park & Paulsson, *French Codification*, *supra* note 92, at 739; Delaume, *supra* note 92, at 39.

my. However, the Decree pushes this principle to its farthest limits.⁹⁴

Subject only to the minimal confines of French "due process,"⁹⁵ the French Decree allows parties to designate the arbitral procedure by referring to French, non-French, or even non-national (i.e. institutional) rules.⁹⁶ In the absence of agreement, the arbitrators are free to determine the procedural law directly or by reference to any law or set of rules.⁹⁷ The doctrine behind this provision is that arbitrators should be able to choose the rules appropriate to the circumstances of the matter before them. "These rules may constitute a mixture of elements drawn from different practices and legal systems so as to establish equality and justice for the parties involved."⁹⁸

The role of the French courts during the proceedings is limited to assisting the parties in the appointment of arbitrators.⁹⁹ The parties may even strip the court of this function.¹⁰⁰ The Court's post-award role has also been restricted. Generally, a losing party may seek either a *de novo* review of the merits or a set aside (*recours en annulation*) for some defect in integrity. Under the new law right to the former (but not the latter) may be waived by the parties.¹⁰¹ As a result, the Decree creates the possibility of an arbitral process essentially independent of any national control.¹⁰²

While the United States, England and France have minimized the influence of its parochial notions of public policy, each continues to protect certain norms. The diversity among domestic arbitration laws and the inability of parties to completely detach the international arbitral process from the peculiar exigencies of these laws have implications beyond the

⁹⁴ Craig, Park & Paulsson, *French Codification*, *supra* note 92.

⁹⁵ For example, an award will be set aside if the process did not respect the principle of *le contradictoire* (fair notice). C. PR. CIV. art. 1502(4) (Dalloz 1987). See also Delaume, *supra* note 92, at 41.

⁹⁶ C. PR. CIV. art. 1494 a.1.

⁹⁷ *Id.* at art. 1494 a.2.

⁹⁸ CRAIG, PARK & PAULSSON, *supra* note 22, at § 16.02.

⁹⁹ C. PR. CIV. art. 1493.

¹⁰⁰ *Id.*

¹⁰¹ CRAIG, PARK & PAULSSON, *supra* note 22, at § 30.01.

¹⁰² Craig, Park & Paulsson, *French Codification*, *supra* note 92, at 736; Carbonneau, *Arbitral Adjudication*, *supra* note 12, at 78-79.

academic. In particular, the lack of complete conformity and party autonomy cause the choice of situs to be especially important.

5. THE PRACTICAL IMPACT OF DIVERSITY: THE EXAMPLE OF ARBITRAL DISCOVERY

5.1. *Evidence Gathering Procedures in Litigation*

Evidence gathering procedures are indispensable to the fair resolution of disputes. The parties and/or the decision-maker must be able to establish a factual record so that they can apply the substantive rules of law.¹⁰³ While all legal systems provide these mechanisms, particular approaches vary from country to country.

In the United States, for example, "[m]utual knowledge of the relevant facts gathered by both parties" is considered essential to fair, effective civil litigation.¹⁰⁴ To that end, "either party may compel the other to disgorge whatever facts he has in his possession."¹⁰⁵ A similar attitude characterizes civil procedure in England.¹⁰⁶

¹⁰³ See CARBONNEAU, *supra* note 2, at 7.

¹⁰⁴ BORN & WESTIN, *supra* note 8, at 262 (citing the United States Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)).

¹⁰⁵ *Id.* In the United States, the tools available to disgorge this information fall under the procedural heading "discovery." The rules of civil procedure in force in most jurisdictions in the United States allow discovery of "any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim of defense of the party seeking discovery or the claim or defense of any other party." FED. R. CIV. P. 26. Discovery can be accomplished through a veritable panoply of devices including depositions upon oral examination or written question, written interrogatories, production of documents or other things, entry upon land, physical or mental examination, and requests for admission. FED. R. CIV. P. 26-37. These procedures are generally available to parties without prior court approval. See BORN & WESTIN, *supra* note 8, at 263.

Despite the lofty goals behind American discovery, abuses have led scholars to severely criticize this procedure. See, e.g., GEOFFREY C. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 123 (1978) (discovery is an "engine of harassment"); Simon Rifkind, *Are We Asking Too Much of Our Courts*, 70 F.R.D. 96, 107 (1976) (discovery permits "the most massive invasion into private papers."); CARBONNEAU, *supra* note 2, at 7 (stating that discovery when abused, is "a means of avoiding a determination of what is legally truthful. . .").

¹⁰⁶ The goal of discovery in English civil procedure is to "ensure that all

The liberal evidence gathering techniques practiced by Anglo-American lawyers are generally unavailable to, and would probably offend, civil law practitioners.¹⁰⁷ Just as the broad discovery practiced in the United States and England is rooted in notions of due process,¹⁰⁸ the comparatively restrictive procedures available in civil law countries reflect equally important public policy considerations such as privacy.¹⁰⁹ These conflicting attitudes and principles have made it very difficult to achieve a consensus on the practice of discovery in international commercial arbitration.¹¹⁰

documents, including those that are unfavorable to a party, should be produced by him to the court." W.G.O. Morgan, *Discovery in Arbitration*, J. INT'L ARB., Sept. 1986, at 9, 11 (vol. 3). Thus, parties are required to list and ultimately produce for inspection any document "relating to matters in question." *Id.* This approach, while similar to that followed in United States, is somewhat more restrained. To begin with, English discovery rules do not extend to third parties. In addition, the English procedure is concerned solely with documentary evidence. While other devices, such as interrogatories, are permitted under English procedural law, Morgan, *supra*, at 13, depositions are rarely permitted. See Perlman & Nelson, *supra* note 8, at 239-41.

¹⁰⁷ Perlman & Nelson, *supra* note 8, at 239-41. See also, Stein & Wotman, *supra* note 63, at 1707; Vincent Fischer-Zernin & Abbo Junker, *Between Scylla and Charybdis: Fact Gathering in German Arbitration*, J. INT'L ARB., June 1987, at 9, 9-10 (vol. 4). Civil law procedures are based on an inquisitorial model. Evidence gathering in civil law systems is conducted almost exclusively by a judicial officer charged with creating the factual record for the case and "is not separate and distinct from what [Americans] would regard as the trial". Perlman & Nelson, *supra* note 8, at 239-41. See also, BORN & WESTIN, *supra* note 8, at 264. Additionally, the scope of evidence gathering is far more narrow in civil law countries than in the United States and England. So-called "fishing expeditions" are not allowed. BORN & WESTIN, *supra* note 8, at 264; Fischer-Zernin & Junker, *supra*, at 9.

¹⁰⁸ Perlman & Nelson, *supra* note 8, at 216-18.

¹⁰⁹ BORN & WESTIN, *supra* note 8, at 265; Fischer-Zernin & Junker, *supra* note 107, at 16-17.

¹¹⁰ Morgan, *supra* note 106, at 22.

5.2 Evidence Gathering in International Commercial Arbitration

5.2.1. The Role of the Arbitrator

The principle of party autonomy in the choice of procedural rules is almost universally recognized.¹¹¹ Thus, parties are generally free to choose the evidence gathering techniques that will be allowed.¹¹² Practitioners often advise parties to take advantage of their freedom to define the scope of permissible discovery in order to avoid needless delays and unwelcome surprises.¹¹³ Yet, even if the parties breach the subject of discovery, they may be unable to arrive at a consensus on what tools should be available.¹¹⁴ Furthermore, breaching

¹¹¹ Van Compernelle, *supra* note 19, at 102.

¹¹² Jarvin, *supra* note 69, at 422.

¹¹³ See McCabe, *supra* note 7, at 526-28; Louis H. Willenken, *Discovery in Aid of Arbitration*, 6 LITIG., Winter 1980, at 16, 18; Rhodes & Sloan, *supra* note 69, at 41.

¹¹⁴ If the desirability of liberal evidence gathering in litigation is dubious, the question is even more debatable in commercial arbitration. McCabe, *supra* note 7, at 502-13. Historically Anglo-American-styled discovery has not been made available in arbitrations. *Id.* at 499-500. See Lawrence W. Newman & Michael Burrows, *Deposition and Other Discovery in Arbitration*, N.Y. L.J., Sept. 1, 1989, at 3 (vol. 202); Ehrenhaft, *supra* note 8, at 1207. Conventional wisdom held that elaborate pre-hearing discovery was anathema to the main objective of arbitration, i.e. to resolve the dispute as quickly and inexpensively as possible. See Nelson, *supra* note 8, at 197-98; Stein & Wotman, *supra* note 63, at 1706; McCabe, *supra* note 7, at 499-500 n.3; Ehrenhaft, *supra* note 8, at 1207. The absence of discovery also benefits parties who are concerned about protecting trade secrets. See Nelson, *supra* note 8, at 197-98.

At the same time, legal scholars and practitioners have begun to call for broader discovery in international commercial arbitration. Some, noting the greater geographic distances involved, have challenged the premise that discovery is incompatible with efficiency. See, e.g., McCabe, *supra* note 7, at 504-05, 523-26. Pre-hearing discovery, including depositions, they argue, can reduce the number of hearings and the need for live testimony. Newman & Burrows, *supra*, at 3; McCabe, *supra* note 7, at 504-05; Willenken, *supra* note 113, at 18. Others have noted that the complex claims that may be raised in international commercial arbitration today require broader discovery to insure that all the information necessary for a fair adjudication will be available to the parties and to the arbitrators. Ehrenhaft, *supra* note 8, at 1199; Nelson, *supra* note 8, at 203-04; Jarvin, *supra* note 69, at 422. The discovery of business documents may be indispensable to parties pursuing non-contractual claims. *Id.*; see also Kurt Riechenberg, *The Recognition of Foreign Privileges in United States Discovery Proceedings*, 9 NW. J. INT'L L. & BUS. 80 n.1. (1988) (citing *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1155 (1979)).

the unpopular topic of formal procedures for resolving future disputes can have a chilling effect on the negotiation of the contract.¹¹⁵ In practice, therefore, most arbitration agreements do not precisely enunciate the applicable evidence-gathering rules.¹¹⁶

Frequently, the parties' agreement or the arbitral tribunal will make reference to a body of arbitration rules, such as those furnished by the American Arbitration Association ("A.A.A."),¹¹⁷ the International Chamber of Commerce ("I.C.C.")¹¹⁸ or UNCITRAL.¹¹⁹ These rules are not comprehensive, but they permit the arbitral tribunal to conduct the arbitration as it sees fit.¹²⁰ For example, each set of rules gives the arbitrators broad discretion to order the production of documents.¹²¹ In some instances the rules allow the arbitrators to order the appearance of witnesses.¹²² The arbitrators, in the absence of the express agreement of the parties, determine the scope of evidence-gathering.

The forum's arbitration law generally affects the autonomy of arbitral evidence gathering in three important ways: it delimits the authority of the arbitrator to order discovery, it determines the availability of local court procedures to enforce arbitral discovery orders,¹²³ and it sets forth what, if any,

¹¹⁵ CRAIG, PARK & PAULSSON, *supra* note 22, at § 23.01.

¹¹⁶ Perlman & Nelson, *supra* note 8, at 227; CRAIG, PARK & PAULSSON, *supra* note 22, at § 23.01.

¹¹⁷ Arbitration Rules of the American Arbitration Association (1986) [hereinafter A.A.A. Rules] *reprinted in* INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, *supra* note 29, at 191-288 (app. B).

¹¹⁸ International Chamber of Commerce, New Rules of Conciliation and Arbitration, I.C.C. Publication No. 447 at 4-38 (1988) [hereinafter I.C.C. Rules] *reprinted in* 28 I.L.M. 231 (1989).

¹¹⁹ United Nations Commission on International Trade Law, 31 U.N. GAOR Supp. (No. 17) at 34, U.N. Doc. A/31/17 (1976) [hereinafter UNCITRAL Rules] *reprinted in* DORE, *supra* note 36, at app. 2 (1986). The UNCITRAL Rules should not be confused with the UNCITRAL Model Law discussed *supra*.

¹²⁰ *E.g.*, I.C.C. Rules, art. 14; UNCITRAL Rules, arts. 1(1), 15(1).

¹²¹ A.A.A. Rules, *supra* note 117, rule 31; I.C.C. Rules, *supra* note 118, art. 14(1); UNCITRAL Rules, *supra* note 119, art. 24(3). *See also* Leahy & Pierce, *supra* note 5, at 300.

¹²² A.A.A. Rules, *supra* note 117, rule 30; I.C.C. Rules, *supra* note 118, art. 15(1).

¹²³ An unenforceable discovery request is useless. Unlike a public judge or magistrate, the arbitrator has no attribute of imperium, and unless the parties so provide, the arbitrator may not punish a recalcitrant party by imposing monetary fines. Van Compernelle, *supra* note 19, at 116.

non-arbitral (i.e. court-ordered) discovery will be permitted in aid of an arbitration.

5.2.2. *Arbitral Discovery in the United States*

Foreign parties and their counsel are often reluctant to arbitrate in the United States for fear that they will be subjected to wide-ranging discovery.¹²⁴ These misgivings are unfounded. In the United States the Federal Rules of Civil Procedure do not govern the procedures for gathering evidence for presentation to an arbitral tribunal.¹²⁵ Rather, the parties (and the arbitrator by default) determine the applicable rules.¹²⁶

The United States Arbitration Act authorizes limited discovery at the discretion of the arbitrator. According to section 7, an arbitrator may issue a summons compelling the testimony of any person or the production of any material document.¹²⁷ While this provision does not *expressly* authorize discovery by written interrogatories or deposition, it has been interpreted to allow *any* discovery which an arbitrator deems necessary.¹²⁸ For example, the district court in *Missis-*

The most efficient and effective sanction available to the arbitrator is the assumption of a negative inference from the refusal of a party to obey a discovery order. McCabe, *supra* note 7, at 529; *see also* Leahy & Pierce, *supra* note 5, at 301; Nelson, *supra* note 8, at 203-04. While no set of arbitral rules expressly authorizes this sanction, arbitrators employ it regularly. Leahy & Pierce, *supra* note 5, at 301. Moreover, both France and the United States approve of its use. *See* C. PR. CIV. art. 11(1) (Fr.); *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 363 (S.D.N.Y. 1975).

When a non-party refuses to comply with a discovery request, the arbitrator cannot draw a negative inference and may find it necessary to seek the aid of the national courts.

¹²⁴ Robert E. Lutz, *International Arbitration and Judicial Intervention*, 10 LOY. L.A. INT'L & COMP. L.J. 621, 625 (1988).

¹²⁵ *Id.* Rule 81(a)(3) of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure apply to proceedings under the USAA "to the extent that matters of procedure are not provided for in [that] statute." FED. R. CIV. P. 81(a)(3). Although this rule would seem to permit broad discovery in aid of arbitration, the courts have held that the operative language, "proceedings under Title 9, U.S.C.," refers to court and not arbitral proceedings. *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 361 (S.D.N.Y. 1957). *See also* Newman & Burrows, *supra* note 114, at 4; Morgan, *supra* note 106, at 17.

¹²⁶ *Commercial Solvents Corp.*, 20 F.R.D. at 361.

¹²⁷ 9 U.S.C. § 7 (1988).

¹²⁸ *Mississippi Power Co. v. Peabody Canal Co.*, 69 F.R.D. 558, 564 (S.D.

*Mississippi Power*¹²⁹ held that an arbitrator, acting pursuant to Rule 30 of the A.A.A. Rules and section 7 of the Act, could "permit any discovery necessary to the performance of his function."¹³⁰

If a party refuses to obey an arbitral discovery request, section 7 authorizes the district courts to compel compliance.¹³¹ The practical importance of this provision is limited. A court may only hear petitions to enforce subpoenas in the district where the arbitral tribunal sits.¹³² If a party controls evidence located outside the district, the ability of the arbitrator to draw a negative inference will probably deter any misbehavior.¹³³ If, on the other hand, a non-party controls the evidence, the arbitrator may have to be more creative.¹³⁴

In general, the courts of the United States are reluctant to involve themselves at the pre-hearing stage of an arbitration by ordering discovery pursuant to state or federal law.¹³⁵ In rejecting requests for non-arbitral discovery, the courts often point out the authority granted to the arbitrators to compel discovery under arbitration rules and statutes.¹³⁶ Despite this hesitancy, U.S. courts have allowed discovery *prior to the selection of the arbitrators* when "extraordinary circumstances" exist.¹³⁷ "[N]ecessity rather than convenience is the

Miss. 1976); *Stanton v. Paine Webber Jackson & Curtis Inc.*, 685 F. Supp. 1241, 1243 (S.D. Fl. 1988); *Corcoran v. Shearson/American Express Inc.*, 596 F. Supp. 1113, 1117 (N.D. Ga. 1984). See also *Newman & Burrows*, *supra* note 114.

¹²⁹ *Mississippi Power Co.*, 69 F.R.D. at 558.

¹³⁰ *Id.* at 564.

¹³¹ 9 U.S.C. § 7 (1988). See also *Leahy & Pierce*, *supra* note 5, at 323 and cases cited in footnote 144.

¹³² 9 U.S.C. § 7 (1988); *Newman & Burrows*, *supra* note 114, at 3 (citing *Thompson v. Zavin*, 607 F. Supp. 780, 782 (C.D. Cal. 1984)).

¹³³ See *supra* note 111.

¹³⁴ *Newman & Burrows*, *supra* note 114. If the evidence is located abroad, the arbitral tribunal may be able to seek the assistance of a foreign court under the Hague Convention. *Id.* If this fails, the tribunal might request its own courts to issue a letter rogatory. *Id.*; *Willenken*, *supra* note 113, at 18. If the evidence is located outside the subpoena range of the court, but within the United States, the arbitrator may still look to 28 U.S.C §§ 1783-1784. *Newman & Burrows*, *supra* note 114, at 3.

¹³⁵ *Lutz*, *supra* note 124, at 626.

¹³⁶ *Newman & Burrows*, *supra* note 114. Granting such requests results in "double-barrelled discovery" contrary to the purpose of arbitration. *Id.* (citing *Mississippi Power Co. v. Peabody Canal Co.*, 69 F.R.D. 558, 567 (S.D. Miss. 1976)).

¹³⁷ *E.g.*, *Bigge Crane and Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240,

test."¹³⁸ Court ordered discovery in aid of *proceeding* arbitrations is even more rare.¹³⁹

Unites States law thus gives maximum effect to the arbitrator's decision. The omni-presence of court-ordered discovery, even if exceptional, reflects the overriding American concern with due process.

5.2.3. *Arbitral Discovery in England*

A well-established principle of English law is that an arbitrator may order such discovery as the arbitrator deems necessary to perform the adjudicatory function properly.¹⁴⁰ The Arbitration Act of 1950 specifically empowers the arbitrator to order discovery of documents and answers to written interrogatories.¹⁴¹ Court orders are also available if a party does not comply.¹⁴² However, the arbitrator's power does not extend to non-parties.¹⁴³

Unlike the United States, an arbitrator's authority to order discovery does not limit the availability of court ordered discovery. According to the Act of 1950, the High Court may simultaneously order discovery, interrogatories, and the giving of evidence by affidavit (a power not expressly given to the arbitrator).¹⁴⁴ Moreover, if an arbitrator refuses to grant a party's discovery request, that party may apply to the High Court for an interlocutory order compelling such discovery.¹⁴⁵ This judicial assistance is considered a "benefit" of the English *lex arbitri* and, as such, cannot be abrogated by an exclusion

245 (E.D.N.Y. 1973) (describing the absence of discovery in arbitration as a "throwback to the 'sporting theory of justice'"); *Penn Tanker Co. v. C.H.Z. Rolimpex*, Warsaw, 199 F. Supp. 716 (S.D.N.Y. 1961); *Bergin Shipping Co. v. Japan Marine Service Ltd.*, 386 F. Supp. 430 (S.D.N.Y. 1974). See also, Willenken, *supra* note 113, at 17-18; Stein & Wotman, *supra* note 63, at 1705-06.

¹³⁸ Lutz, *supra* note 124, at 626.

¹³⁹ Morgan, *supra* note 106, at 20 n.32.

¹⁴⁰ *Id.* at 13.

¹⁴¹ Arbitration Act, 1950, § 12(1) (Eng.) [hereinafter Arbitration Act]. See also Morgan, *supra* note 106, at 13; Stein & Wotman, *supra* note 63, at 1706-07.

¹⁴² Arbitration Act, *supra* note 141, at § 12(6).

¹⁴³ See *supra* note 96.

¹⁴⁴ Arbitration Act, *supra* note 141, at § 12(4); Mustill & Boyd, *supra* note 82, at 21.

¹⁴⁵ Arbitration Act, *supra* note 141, at § 12(6)(b).

agreement.¹⁴⁶ While helpful in many instances, this principle runs contrary to the notion of party autonomy and the delocalization of arbitral procedure.¹⁴⁷

5.2.4. *Arbitral Discovery in France*

An arbitrator gathering evidence under French domestic arbitration law is more constrained than under American and English law. Under the N.C.P.C., the arbitrator can enjoin the production of evidence (*élément de preuve*) in the hands of a party,¹⁴⁸ but cannot compel compliance.¹⁴⁹ Furthermore, the arbitrator cannot address a request to non-party.¹⁵⁰

On the other hand, a party may apply to the French courts for an order compelling the production of a document in the hands of any other party.¹⁵¹ The court can order a recalcitrant party to pay a daily fine (*astreint*) until that party complies.¹⁵² Finally, only a court may issue a subpoena.¹⁵³

While French domestic arbitration law severely curtails the arbitrator's freedom to gather evidence, the same rules do not necessarily apply in international arbitrations. The French Decree of 1981 provides that unless the parties or the arbitrator so choose, French domestic arbitration law does not apply.¹⁵⁴ Presumably an arbitrator could select more extensive evidence gathering procedures for an international arbitration than would be available in a domestic one.

However, while the French law unshackles the arbitrator from domestic arbitration law, it reinforces the public policy concern for third parties. An enthusiastic arbitrator might decide that depositions are appropriate but would be unable to affect a non-party witness.¹⁵⁵

¹⁴⁶ Park, *supra* note 33, at 44. See *supra* Section 3.2.2.

¹⁴⁷ CRAIG, PARK & PAULSSON, *supra* note 22, at § 29.03.

¹⁴⁸ C. PR. CIV. art. 1460(3) (Fr.).

¹⁴⁹ Delaume, *supra* note 92, at 43; Stein & Wotman, *supra* note 63, at 1707. Accord, Van Compernelle, *supra* note 19, at 116 (discussing Belgian arbitration law). The arbitrator's only recourse is to draw a negative inference from the refusal. C. PR. CIV. art. 11(1) (Fr.).

¹⁵⁰ Whereas C. PR. CIV. art. 11(2) permits a court to order any person to produce evidence, art. 1460(2) does not incorporate this provision, but instead provides art. 1460(3).

¹⁵¹ C. PR. CIV. art. 11(2) (Fr.).

¹⁵² *Id.*

¹⁵³ Delaume, *supra* note 92, at 43; Stein & Wotman, *supra* note 63, at 1707.

¹⁵⁴ C. PR. CIV. art. 1494 (Fr.). See *supra* notes 90-96.

¹⁵⁵ Ironically, if no reference is made to French law, a party might not

6. CONCLUSION

While parties engaged in international commerce clamor for greater autonomy and uniformity in arbitration, and scholars contemplate the possibility of denationalized arbitration, domestic law continues to impose very real and very diverse constraints on the process. The concept of international public policy suggests that some contractual relationships are less threatening to domestic concerns than others and therefore warrant only minimal judicial supervision. Nevertheless, so long as basic notions of justice and morality differ from one country to another, so too will arbitration law.

even be able to invoke the power of the court to compel the production of third party documents. By severing the ties that bind the arbitration to the situs the parties not only free themselves of local judicial interference, but also free themselves from local judicial assistance.